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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GRACIE ROBINSON AND JUANITA HAGER, on behalf of themselves and all other persons similarly situated,

Respondents

v.

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS; JULIUS MULLINS, KENNETH L. HOUCK, AND PAUL R. DEAN, TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA HEALTH & RETIREMENT FUNDS,

Petitioners

PETITION OF UNITED MINE WORKERS OF AMERICA HEALTH & RETIREMENT FUNDS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the substantive terms of a collective bargaining agreement, embodied in an employee welfare trust, are subject to review by federal courts for reasonableness, pursuant to Section 302(c)(5) of the Labor-Management Relations Act, 1947 ("LMRA"), 29 U.S.C. §186(c)(5) (1976).

2. Whether Section 302(c)(5) of the LMRA requires collective bargaining parties to commit an unfair labor practice by bargaining to impasse on behalf of the widows in respondents' class, who are not members of the bargaining unit.

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Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Trustees of the United Mine Workers of America Health and Retirement Funds ("Funds") respectfully petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment entered by that Court on February 5, 1981, in *Gracie Robinson and Juanita Hager, et al. v. United Mine Workers of America Health & Retirement Funds, et al.* No. 78-2047 (D.C. Cir. February 5, 1981).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, reported at 640 F.2d 416, appears as Appendix A to this petition.[1] The judgment of the United States District Court for the District of Columbia from which appeal was taken, and the District Court's unreported memorandum opinion and order of June

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[1]The appendices to the Petition are bound together in a separate volume.

20, 1978, appear as Appendices B and C, respectively. The District Court's memorandum opinion of April 25, 1978, reported at 449 F.Supp. 941, appears as Appendix D. The judgment of which review is sought appears as Appendix E. The orders of the Court of Appeals denying the petition for rehearing and suggestion for rehearing *en banc* appear as Appendix F.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1981 (App. E at 35a). The petition for rehearing and suggestion for rehearing *en banc* was denied on April 13, 1981 (App. F. at 37a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves Section 302(c)(5) of the LMRA, 29 U.S.C. §186(c)(5); Section 2(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §152(3)(1976); and Section 8(b)(3) of the (NLRA, 29 U.S.C. §158(b)(3)(1976). These statutory provisions are set forth in Appendix N.

STATEMENT OF THE CASE

Statement of Proceedings

On April 22, 1977, Gracie Robinson ("Robinson") and Juanita Hager ("Hager"), on behalf of themselves and all other persons similarly situated, filed a complaint against the United Mine Workers of America ("UMWA") 1950 Benefit Plan and Trust ("1950 Benefit Trust") and its Trustees in the United States District Court for the District of Columbia. The complaint alleged that Article II E of the 1950 Benefit Trust was arbitrary and capricious in violation of Section 302(c)(5) of the LMRA insofar as it provided life-time health coverage to the survivors of retired miners who died prior to December 6, 1974, while "receiving" pensions, but not to the survivors of miners

who, although age and service-eligible for pensions, died while still employed. The complaint further alleged that the Trustees' denial of life-time health coverage to Robinson and Hager, solely on the basis that their husbands were not "receiving" pensions at the time of their deaths, constituted a breach of the Trustees' fiduciary duty to administer the 1950 Benefit Trust for the sole and exclusive benefit of the employees of contributing employers in accordance with Section 302(c)(5) of the LMRA.

The Trustees answered on May 12, 1977, denying that they had acted arbitrarily and capriciously or that they had breached their fiduciary duty to Robinson and Hager and others similarly situated. And, by way of defense, the Trustees stated that the eligibility terms of the 1950 Benefit Trust were established by collective bargaining between the United Mine Workers of America ("Union") and the Bituminous Coal Operators' Association, Inc. ("Industry"); that they had acted in accordance with the express terms of the Trust; and that they had no authority to alter those terms.

On September 20, 1977, United States District Judge Gerhard A. Gesell certified the action as a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure (App. D at 27a).[2] Cross motions for summary judgment were filed, and oral argument was heard by Judge Gesell on February 3, 1978. On April 25, 1978, Judge Gesell issued a memorandum opinion and order stating that a trust provision violates Section 302(c)(5) of the LMRA only if it fails to operate for the "sole and exclusive benefit" of employees of contributing employers. In Judge Gesell's view, an "arbitrary" denial of benefits to the class would violate that standard, and, in that event,

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[2]The class was defined as all surviving spouses and dependent children of deceased coal miners:

(a) whose decedents prior to the time of death satisfied the age and service requirements for pension benefits;

(b) who would be eligible for survivors' health benefits under the terms of the 1950 Benefit Plan and Trust if their decedents had been receiving pension benefits at the time of death; and

(c) whose decendents fit within one of the following subclasses:

(1) was working in classified service in the coal industry at the time of death and had not applied for a pension;

(2) had applied for and was eligible to receive pension benefits but was not receiving such benefits at the time of death because of his return to classified service in the coal industry. [App. D at 27a.]

the Trustees would be required to reform the 1950 Benefit Trust, even though it was the product of collective bargaining. (App. D at 30a.) In that regard, Judge Gesell found that the class had raised a presumption of arbitrariness with respect to the discrepancy between benefits for the survivors of active and retired miners, and that, on the existing record, the Trustees had failed to rebut the presumption by producing a rationale for the discrepancy (App. D at 31a-32a). Accordingly, Judge Gesell ordered that the Trustees would have until May 12, 1978, to produce relevant testimony from the Union and the Industry, and that in the event no testimony was forthcoming, summary judgment would be granted to the class and denied to the Trustees (App. D at 32a-34a).

Pursuant to the order, the Trustees submitted documentary evidence and oral testimony concerning the circumstances leading to the disputed provision at a hearing before Judge Gesell on June 14, 1978 (App. C at 24a). Based on that evidence, Judge Gesell concluded, in a memorandum opinion and order entered on June 20, 1978, that the exclusion of the class from life-time health coverage was a " . . . legitimate product of deliberate and good faith collective bargaining . . ." that was not subject to judicial review (App. C at 25a). Judgment was entered for the Trustees on June 20, 1978 (App. B at 23a).

The class appealed, and, on February 5, 1981, a divided panel of the United States Court of Appeals for the District of Columbia Circuit reversed the judgment of the District Court. On March 6, 1981, the Trustees petitioned for rehearing and suggested rehearing *en banc*. The petition and suggestion were denied on April 13, 1981. (App. F at 37a, 38a.) This petition followed.

Statement of Facts

Respondents, Robinson and Hager, are the named representatives of a certified class consisting of the spouses and dependents of coal miners who died while employed between 1946 and 1974, and who, at the time of their deaths, were age and service eligible for a pension under the UMWA Welfare and Retirement Fund of 1950 ("1950 Fund") (App. H at 73a-74a).

The 1950 Fund provided death and health benefits to certain survivors of active and retired miners. Eligibility for those benefits was governed by Resolutions adopted from time-to-time by the Trustees of the 1950 Fund, pursuant to the broad authority vested in them by

the National Bituminous Coal Wage Agreement of 1950 (App. H at 73a-75a; App. I at 78a).

At the time of the deaths of respondents' husbands, Resolution Nos. 68 and 69, adopted by the Trustees of the 1950 Fund on January 19, 1967, governed the payment of death and health benefits to survivors of active and retired miners. (App. H at 73a-74a; App. J at 82a; App. K at 89a.) Under the terms of the Resolutions, the survivors of retired miners who were receiving pensions at the time of their deaths were entitled to a death benefit of $2,000 and medical benefits for two years (App. J. at 85a; App. K at 90a). The survivors of active miners who were age and service-eligible for pensions, but who died while employed, were entitled to a death benefit of $5,000 and medical benefits for five years (App. J at 85a; App. K at 90a). Because their husbands died while employed, Robinson and Hager each received a death benefit of $5,000 and medical benefits for five years (App. H at 74a).

Subsequently, the Union and the Industry entered collective bargaining negotiations that resulted in the adoption of the National Bituminous Coal Wage Agreement of 1974 ("1974 Wage Agreement"). In the 1974 Wage Agreement, the Union and the Industry dissolved the 1950 Fund and, pursuant to Section 302(c)(5) of the LMRA, established the four separate employee benefit trusts known as the Funds. The petitioners are the Trustees of each of the four trusts. The particular trust involved in this case is the 1950 Benefit Trust, which provides medical benefits to eligible miners who retired prior to December 6, 1974, and medical and death benefits to the spouses and dependents of miners who died before that date. Medical and death benefits for the spouses and dependents of miners who died after December 6, 1974, are provided by the UMWA 1974 Benefit Plan and Trust ("1974 Benefit Trust"), the terms of which are not at issue in this case.

An overriding issue in the negotiations of the 1974 Wage Agreement was the level of pension and health benefits to be provided by the Funds (App. G at 64a-65a). At the outset, the Union made a series of demands for improved pension and health benefits. In particular, the Union insisted that health benefits for the survivors of pensioners and pension-eligible active miners be extended from the two and five-year levels provided by the 1950 Fund to permanent, life-time coverage in the 1950 and 1974 Benefit Trusts. (App. G at 41a-44a.) As negotiations progressed, the Union modified and narrowed its other

benefit demands, but continued to insist that the widows of both pensioners and pension-eligible active miners be given life-time health coverage. The Industry consistently opposed those demands. (App. G at 45a-49a.)

The Industry was particularly troubled by the demand for lifetime health coverage for the widows of pension-eligible active miners in respondents' class. The Union and Industry estimates of the size of this class were uncertain, but ranged up to 4,000 members (App. G, 50a-51a). Based on a variety of factors, the Industry was concerned that the estimates might be substantially understated. (App. G at 66a-67a, 69a-71a.) Moreover, the Industry was concerned that the estimates of cost increases for health care might be understated (App. G at 71a-72a). In light of these cost uncertainties, the Industry consistently rejected the Union's efforts to include this class of widows in the improved benefits package (App. G, 66a-68a).

After nearly two months of negotiation, the parties approached the expiration date of the existing wage agreement. The Union regarded that date as the deadline for achieving agreement while avoiding a prolonged strike. (App. G at 52a-54a.) Accordingly, until the last day of the existing agreement, the Union continued to demand life-time health coverage for the widows of pension-eligible active miners in respondents' class (App. G at 54a-57a). However, on the last day, November 12, 1974, the Union dropped its demand on behalf of this class in order to avert a prolonged strike (App. G at 52a-54a, 57a-60a, 67a-68a).

Consequently, at the conclusion of the negotiations, the parties agreed that the widows of pensioners and pension-eligible active miners who died after December 6, 1974, would receive life-time health coverage under the 1974 Benefit Trust (App. D at 28a-29a). And, the parties agreed that the widows of retired miners who died before December 6, 1974, while "receiving" pensions, would receive life-time health coverage under the 1950 Benefit Trust. The parties agreed, however, that the widows in respondents' class, whose pension-eligible husbands died before December 6, 1974, while employed, would continue to receive only five years of health coverage under the 1950 Benefit Trust. (App. M at 114a-116a.)

The majority of the panel of the Court of Appeals held that the Union's failure to obtain benefits for the widows in respondents' class equal to those obtained for the widows of pensioners under the 1950

Benefit Trust created an arbitrary and irrational distinction in violation of Section 302(c)(5) of the LMRA, which requires that collectively bargained trust funds be maintained "for the sole and exclusive benefit of the employees of the employer, and their families and dependents." 29 U.S.C. §186(c)(5); *Robinson v. United Mine Workers of America Health and Retirement Funds, supra,* slip. op. at 11-14, 15 (App. A at 10a-12a, 13a.) In the view of the majority of the panel, Section 302(c)(5) imposes a duty upon the collective bargaining parties to negotiate "reasonable" eligibility standards and to ". . . advance an adequate explanation for their action." *Robinson v. United Mine Workers of America Health and Retirement Funds, supra,* slip. op. at 15 (App. A at 13a). Therefore, according to the majority, eligibility standards are subject to judicial review under Section 302(c)(5) for reasonableness regardless of " . . . who formulated the eligibility standards and how it was done." *Robinson v. United Mine Workers of America Health and Retirement Funds, supra,* slip. op. at 13 (App. A at 12a).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals that the substantive terms of a collective bargaining agreement, embodied in an employee welfare trust, are subject to review by federal courts for "reasonableness," pursuant to Section 302(c)(5) of the LMRA, conflicts with applicable decisions of the Supreme Court and raises an important question of federal law that has not been, but should be, decided by the Supreme Court.

The Court of Appeals decided that the collectively-bargained exclusion of the widows of pension-eligible active miners in respondents' class from life-time health coverage was unreasonable. In the Court's view, if eligibility standards appear unreasonable, then " . . . who formulated the eligibility standards and how it was done are irrelevancies." *Robinson v. United Mine Workers of America Health and Retirement Funds, supra,* slip op. at 13 (App. A at 12a). Although the Court of Appeals recognizes that collective bargaining parties may select eligibility rules, they must, in the Court's view, be able to "advance an adequate explanation for their action" *Id.* slip.

op. at 15 (App. A at 13a). In short, the Court holds that collectively-bargained eligibility standards are subject to judicial review under Section 302(c)(5) of the LMRA for reasonableness. This holding directly conflicts with decisions of the Supreme Court.

The Supreme Court has long recognized that the policy of the national labor laws is to promote collective bargaining, "free of any government compulsion to agree to a [particular] proposal, or even reach an agreement. . . ." *Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212, 219 (1979). In line with that policy, the Court has consistently rejected attempts by the National Labor Relations Board ("Board") and other governmental bodies to substitute their judgment concerning the substantive provisions of labor agreements for that of the collective bargaining parties. *E.g., N.L.R.B. v. American Nat. Ins. Co.*, 343 U.S. 395, 404 (1952); *Local 24 of I.B. of T., etc. v. Oliver*, 358 U.S. 283, 295-96 (1959). Instead, the Court has recognized that "[w]ithin the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed." *Local 24 of I.B. of T., etc. v. Oliver, supra*, 358 U.S. at 295. Indeed,

> . . . it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement. [*H. K. Porter Co. v. N.L.R.B.*, 397 U.S. 99, 103 (1970).]

Of course, collective bargaining agreements are not completely insulated from outside scrutiny. A collective bargaining agreement that discriminates against members of a unit because of their race will not be tolerated. *Steele v. Louisville and Nashville R.R. Co.*, 323 U.S. 192 (1944). Similarly, a collective bargaining agreement that fosters racial discrimination against non-unit members will be struck down. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952).

In addition, a collective bargaining agreement that interferes with the organizational rights of employees under Section 7 of the NLRA, 29 U.S.C. §157, upon which collective bargaining is based, may also be reviewed and overturned. For example, in *N.L.R.B. v. Magnavox Co.*, 415 U.S. 322 (1974), the Supreme Court held that collective bargaining parties could not waive the Section 7 right of employees "to form, join, or assist labor organizations" by agreeing to an employer rule that prohibited the distribution of union literature on

company property. 29 U.S.C. §157; *N.L.R.B. v. Magnavox Co., supra*, 415 U.S. at 325-326. In reaching that decision, the Court considered the well-established principle that the agreements of collective bargaining parties with respect to wages and other economic benefits are not subject to judicial interference. *N.L.R.B. v. Magnavox Co., supra*, 415 U.S. at 325. However, because good faith collective bargaining in the economic area depends upon the free exercise of Section 7 rights, the Court decided that a different rule should apply to agreements involving those rights. Such agreements may be reviewed, and, if they interfere with rights guaranteed by Section 7 of the NLRA, they will be overturned. *N.L.R.B. v. Magnavox Co., supra*, 415 U.S. at 325-327; *see Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270 (1956).

But, in the absence of a defect such as this, which is "destructive of the foundation on which collective bargaining must rest," *Mastro Plastics Corp. v. N.L.R.B., supra*, 350 U.S. at 281, or "a grave constitutional issue that should be squarely faced", *Steele v. Louisville and Nashville R.R. Co., supra*, 323 U.S. at 208 (Murphy, J., concurring), Congress did not intend the Board or the Court to "[set] itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make." *N.L.R.B. v. American Nat. Ins. Co., supra*, 343 U.S. at 404, quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 19 (1947); *see N.L.R.B. v. Magnavox Co., supra*, 415 U.S. at 325-326; *Mastro Plastic Corp. v. N.L.R.B., supra*, 350 U.S. at 280-281; *Tomlin v. Bd. of Trustees of Const. Laborers Pension Trust*, 586 F.2d 148, 151 (9th Cir. 1978). So long as the proposals and counterproposals are made in good faith collective bargaining, acceptance is not subject to review.

The record before the Court of Appeals clearly showed that lifetime health coverage for the widows in respondents' class had been the subject of prolonged, intense, and informed bargaining. The Union began negotiations by demanding that the widows of pensioners and the widows of pension-eligible miners in respondents' class be given, for the first time, life-time health coverage (App. G at 41a-46a). The Industry was particularly opposed to the demand for lifetime health coverage for widows of pension-eligible miners in respondents' class (App. G at 65a-68a). The Industry was concerned that the size of the class and the cost of providing health care to its members might be greatly understated (App. G at 66a-68a, 69a-71a).

The Union, however, pressed its demands on behalf of all widows, including those in respondents' class, until the day before the expiration of the collective bargaining agreement (App. G at 53a-57a). On that date, the Union withdrew its demand on behalf of widows in respondents' class, in the face of continued Industry opposition, in order to avert a prolonged strike. (App. G at 52a-54a). Consequently, the parties agreed to provide that the widows of retired miners who died prior to December 6, 1974, while "receiving" pensions, would be eligible for life-time health coverage, but that the widows of pension-eligible miners who died prior to that date would continue to receive only five years of health coverage. (App. M at 114a-117a).

The Court of Appeals acknowledged that this agreement was ". . . a compromise hammered out by 'explicit, informed and intense' bargaining on a problem difficult of resolution in a mutually acceptable manner." *Robinson, et al. v. United Mine Workers of America Health and Retirement Funds, et al., supra,* slip. op. at 13 (App. A at 11a-12a.) Therefore, the Court should have declined to review the exclusion of respondents' class from life-time health coverage. *E.g., N.L.R.B. v. American Nat. Ins. Co., supra,* 343 U.S. at 404. Instead, the Court decided to "become a party to the negotiations and impose its own view of a desirable settlement." *H.K. Porter Co. v. N.L.R.B., supra,* 397 U.S. at 103-104; *see Carbon Fuel Co. v. United Mine Workers of America, supra,* 444 U.S. at 219; *N.L.R.B. v. American Nat. Ins. Co., supra,* 343 U.S. at 404.

The Court of Appeals justifies its intervention on the basis that eligibility requirements of employee welfare trusts established through collective bargaining are subject to review under Section 302(c)(5) of the LMRA for reasonableness. *Robinson v. United Mine Workers of America Health & Retirement Funds, supra;* slip. op. at 13 (App. A at 11a-12a.) In support of this proposition, the Court relies upon a series of cases involving eligibility rules established, not by collective bargaining parties, but by trustees of employee welfare trusts, pursuant to the broad authority vested in them by the collective bargaining agreement in which the trust itself was established. *Robinson v. United Mine Workers of America Health and Retirement Funds, supra,* slip. op. at 8-12, notes 26-38 (App. A at 7a-10a). These cases, however, establish only that section 302(c)(5) permits a court of equity to review, and to impose limits upon, the trustees' "broad discretion in setting eligibility requirements," *Roark v. Lewis,* 401

F.2d 425, 427 (D.C. Cir. 1968), because trustees ". . . like all fiduciaries, are subject to judicial correction . . . upon a showing that they have acted arbitrarily or capriciously. . . ." *Kosty v. Lewis*, 319 F.2d 744, 747 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964); *Pete v. UMWA Welfare and Retirement Fund of 1950*, 517 F.2d 1275, 1283 (D.C. Cir. 1975); *Roark v. Boyle*, 439 F.2d 497, 498-99, 508 (D.C. Cir. 1970); *Gaydosh v. Lewis*, 410 F.2d 262, 263-65 (D.C. Cir. 1969); *Roark v. Lewis*, 401 F.2d 425, 427 (D.C. Cir. 1968).

Collective bargaining parties, however, are not subject to correction on such a basis. Under Section 302(c)(5), judicial review of collectively-bargained eligibility terms is limited to ensuring that trust funds are used for the "sole and exclusive benefit" of employees of contributing employers and their families and dependents. 29 U.S.C. §186(c)(5); *see, e.g., Walsh v. Schlect*, 429 U.S. 401, 408, 410 (1975); *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Company*, 404 U.S. 157, 169-170 (1971); *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 394 U.S. 919 (1969); *see also Roark v. Boyle, supra*, 439 F.2d at 501-502, 505-506. It is well established that, where these requirements are met, the collective bargaining parties are free to allocate benefits as they choose. *See Ford Motor Company v. Huffman*, 345 U.S. 330, 339-340 (1953); *Tomlin v. Bd. of Trustees of Const. Laborers Pension Trust*, 586 F.2d 148, 151 (9th Cir. 1978).

The Court of Appeals has concluded, however, that it may revise the benefit allocation decided upon by the Union and the Industry in good faith collective bargaining to comply with its own standard of reasonableness. We submit that, by so concluding, the Court has

> violate[d] the fundamental premise on which the [National Labor Relations] Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract. [*H.K. Porter Co. v. N.L.R.B., supra*, 397 U.S. at 108.]

II

The Court of Appeals decided that Section 302(c)(5) of the LMRA requires the collective bargaining parties to bargain to impasse on behalf of the widows in respondents' class, who are not members of the bargaining unit, in violation of Section 8(b)(3) of the NLRA and decisions of the Supreme Court.

The Court of Appeals has decided that Section 302(c)(5) imposes a duty upon the collective bargaining parties to negotiate reasonable eligibility standards and to "advance an adequate explanation for their action." *Robinson v. United Mine Workers of America Health and Retirement Funds, supra,* slip. op. at 15 (App. A at 13a). In this respect, the Court found "no legally acceptable justification" for the exclusion of respondents' class from life-time health benefits. *Id.* at 16 (App. A at 14a). According to the Court, it was not ". . . enough that the particular eligibility standards were adopted simply because that enabled resolution of a collective bargaining dispute," and avoidance of a prolonged strike. *Id.* at 16 (App. A at 14a). Indeed, Judge Davis added, in his concurring opinion, that "there was no quid pro quo for the dropping of labor's insistence on inclusion of this class", but, instead, "a deliberate and hurried determination . . . to sacrifice this class" to avoid a conflict.[3] *Id.* at 2 (Davis, J., concurring). (App. A at 15a-16a.) It is submitted, however, that the union's decision to withdraw its demand on behalf of the widows in respondents' class for life-time health benefits was consistent with the Supreme Court's mandate in *Allied Chemical and Alkali Workers of America v. Pittsburg Plate Glass Company, supra,* 404 U.S. 157.

In *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Company, supra,* 404 U.S. 157, the Supreme Court ruled that retired workers were not members of the collective bargaining unit, and, therefore, medical coverage for those workers was not a mandatory subject of collective bargaining under Section 8(d) of the NLRA, 29 U.S.C. §158(d). Like the retired workers in *Pittsburgh*

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[3] In this respect, we note that concessions

> . . . are seldom if ever gratuitously granted in the give and take of the collective-bargaining process. In return, the union typically exacts some form of quid pro quo from the management negotiators. Since it is usually impossible to identify the consideration given in return for a particular union concession, the result of nullifying a union's agreement . . . will necessarily be to deprive management of the benefit of its bargain and to leave the union with a windfall. This sort of invalidation of bargained-for concessions does not promote stability in the collective bargaining process and must certainly have a negative effect on labor-management relations. For this reason, the Board and the courts should not relieve the parties of the promises they have made unless a contractual provision violates a specific section of the [NLRA] or a clear underlying policy of federal labor law. *N.L.R.B. v. Magnavox Co., supra,* 415 U.S. at 328-329 (Stewart, J., concurring in part and dissenting in part).

Plate Glass Company, the deceased miners from whom respondents' class members derive their status are not part of the bargaining unit, and the demands made on behalf of their survivors are non-mandatory subjects of bargaining. *Turner v. Loc. U. No. 302, Intern. Broth. of Teamsters*, 604 F.2d 1219, 1225 (9th Cir. 1979).[4] Of course, the Union was free to, and did, engage in permissive bargaining on behalf of the class. *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Company, supra*, 404 U.S. at 171, note 11. The Industry was equally free to reject, unequivocally, the Union's demands on behalf of the class. *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). What the Union could not do, however, was bargain to impasse on the issue. To have done so would clearly constitute an unfair labor practice under Section 8(b)(3) of the NLRA. *Id.; N.L.R.B. V. Massachusetts Nurses Ass'n.*, 557 F.2d 894, 899 (1st Cir. 1977).

The Court of Appeals decided, however, that the union had a duty to bargain to impasse on behalf of the widows in the respondents' class, even though to do so would constitute an unfair labor practice under Section 8(b) (3) of the NLRA, because Section 302(c) (5) of the LMRA governs collective bargaining of employee welfare trusts. The Court fails to recognize that the Supreme Court decisively rejected this conclusion in *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Company, supra*. As the Supreme Court stated in that case:

> . . . the union's role in the administration of the [302(c)(5)] Fund is of a far different order from its duties as a collective bargaining agent. To accept the Board's reasoning that the union's §302(c)(5) responsibilities dictate the scope of the §8(a)(5), collective-bargaining obligation would be to allow the tail to wag the dog. [*Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Company, supra*, 404 U.S. at 170-71.]

The decision of the Court of Appeals creates the very anomaly the Supreme Court sought to avoid. Accordingly, it should not be allowed to stand.

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[4]To be a member of the collective bargaining unit, an individual must be an "employee" within the meaning of Section 2(3) of the NLRA, 29 U.S.C. §152(3). An "individual who has ceased work without expectation of further employment" is not an "employee". *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Company, supra*, 404 U.S. at 168.

CONCLUSION

Based upon the foregoing, the Trustees of the 1950 Benefit Trust respectfully submit that certiorari should be granted to review the judgment of the Court of Appeals.

Respectfully submitted,

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